loading Boyls into an ambulance. Smith approached Freeman and asked him if he could walk to the ambulance. Freeman's mouth was "full of blood" when he responded that he could. Both Freeman and Boyls were transported by ambulance to nearby Norman Regional Hospital.

Upon the arrival of Freeman and Boyls at Norman Regional, Dr. Richard Swenson, the emergency room physician, attended to Boyls, who was in full arrest. Boyls was pronounced dead forty-four minutes after her arrival at the hospital. At the same time, police officers Swanner and Hart met the ambulance at the hospital as it arrived at the emergency room. Swanner observed Freeman in the ambulance and escorted Freeman into the emergency room. According to Swanner, Freeman had a thick, gravelly voice and an unsteady gait while walking into the ER.

Emergency room nurse Brigitte Squyres tended to Boyls and then to Freeman. During her treatment of Freeman, Freeman sat on a bed in one of the ER bays and two police officers were present. Squyres took Freeman's vital signs and performed a general assessment. When she finished, the police officers present requested that she draw blood from Freeman and she complied.

Prior to the blood draw, nurse Squyres asked Freeman if he was taking any medication and he replied, "morphine." Squyres stated that the reason she asked that question was *purely medical* "so that it [medication] won't interact if we're going to be giving pain medications or anything of that kind, we need to know what they're on so it doesn't interact with them and cause any kind of reaction."

As nurse Squyres was obtaining the blood kit, Officer Swanner read to Freeman the "implied consent test request"

from a pre-printed form and ascertained from Freeman whether he consented to the blood draw. According to Swanner, after he read the form to Freeman, Freeman replied, "yeah," indicating that he would take the State's test. At this point, nurse Squyres returned and drew Freeman's blood.

The blood draw occurred at 22:48 (10:48 p.m.). Nurse Squyres asked Freeman to disrobe per physician's requirements that persons involved in motor vehicle collisions must be subjected to a complete physical. Squyres testified at trial that she "was turning around walking out when he was disrobing" but she turned back around when she heard something hit the floor. She observed on the floor a small syringe and "a container of some sort." One of the officers present picked the items up from the floor. The items were two syringes and a "Tic-Tac" box containing fourteen morphine pills, cotton balls, and a spoon.

According to Squyres, Freeman's physical condition at this time consisted of a broken arm and blood on his face. She was unaware that Freeman had been unconscious for ten minutes at the accident site, but Freeman's discharge sheet did reflect a head injury.

At this point, Freeman was moved to another ER bay and attended to by another nurse, Bryan O'Rourke. In the new ER bay, nurse O'Rourke treated Freeman ***with Officers Hart and Swanner in tow***. O'Rourke testified at trial that Freeman admitted to injecting "opium" and seemed to be intoxicated. O'Rourke brought in another blood test kit and, although he was not present during the initial draw, he was present when "the last tube was drawn." ***Officer Swanner was present with the nurses during their treatment of Freeman and heard Freeman's statements***. At no time during the medical

treatment did Officer Swanner read the *Miranda* warnings to Freeman.

Officer Swanner finally did administer the *Miranda* warnings to Freeman at the Emergency Room at 01:00 a.m. on March 17, 1998 and *then again* at 01:30 a.m. After hearing Freeman's statements to the attending nurses, Officer Swanner extracted a "voluntary statement" from Freeman that stated:

> I went to Oklahoma City from Norman to buy morphine. I shot this morphine intravenously (85 milligrams). Unfortunately, I had only five hours of sleep in the last three days. I was driving home and having a very hard time staying awake. I faded out, crossed the center line, woke up after the crash. I feel so very bad for the loss of life. Unfortunately, drug abuse has been a struggle for me and it affects me and my family.

This statement was obtained only after police had listened in on Freeman's exchange with the nurses in which he divulged information asked of him for purposes of medical treatment. ***From the time that Freeman arrived at Norman Regional Hospital, Officer Swanner never left his side.*** When the ambulance within which Freeman was sitting arrived at the hospital, Officer Swanner was waiting. Officer Swanner approached Freeman, opened the door to the ambulance and asked Freeman, "What are you doing?" because Officer Swanner felt that Freeman put something down his pants.

Officer Swanner told Freeman, "Let's go inside [the ER]," and ***escorted*** Freeman to the ER. Officer Swanner was joined by Officer Hart at the entrance to the hospital and ***both***

of them escorted Freeman to one of the curtain-partitioned bays of the ER. Officer Swanner was with Freeman "at all times" as the trio walked to the ER bay. ***At no time did Freeman affirmatively invite the two officers into the treatment area or give consent for the officers to be present when Freeman was tended to by the medical staff.*** The record reflects quite clearly that Officer Swanner, in uniform, asserted his authority and simply inserted himself in the treatment room without being invited or asked by Freeman *or* any medical staff.

Officer Swanner took charge in the room by requesting a blood kit from the nursing staff and then later reading the implied consent form to Freeman when the two of them were alone. At the time Officer Swanner read the implied consent form to Freeman, he considered Freeman in his "custody" and was clearly acting under the authority of his status as a police officer, actively investigating Freeman, and trying to obtain evidence to support his "suspicions" that Freeman had been driving under the influence of an intoxicant.

Officer Swanner became suspicious from the time that Freeman exited the ambulance and walked into the ER; and he believed that he had probable cause to arrest Freeman for DUI from the moment Freeman stepped out of the ambulance as it arrived at the hospital.

During Freeman's treatment by the medical staff, when Freeman answered questions put to him by the nurses, ***Officer Swanner never left the room and never advised Freeman that he was under arrest or that any statements he made would not be privileged and would be used against him in a criminal prosecution; nor was Freeman or any member of the medical staff advised that Officer Swanner was surreptitiously tape recording the conversation in the room.***

In addition, the implied consent form ***specifically advised*** Freeman that he was ***not entitled to consult with counsel prior to making the decision whether to submit to the State's blood test***.

Freeman's statements, made to medical personnel and overheard by police officers, formed an integral part of the State's case.

DESCRIPTION OF CONSTITUTIONAL ISSUE

Do constitutional guarantees of Due Process, the right to counsel, and the right against self-incrimination, limit the conduct of police officers investigating drunk driving cases by prohibiting them from shadowing injured persons to emergency rooms and sitting in, uninvited, on interviews such injured persons have with medical personnel for the sole purpose of diagnosis and treatment?

In this case, Freeman at no time *consented* to the police being present during his treatment, never *invited* them to the ER bay, he had just been in a head-on collision and needed medical care, and the record is clear that Officers Swanner and Hart simply showed authority and stayed close to him because no one challenged their authority to do so.

Freeman simply *acquiesced to this authority* because he was injured and needed help, had no alternative way to get the care he needed, and was required to answer truthfully the questions posed to him in order to ensure his physical safety–the very basis for the existence of the physician-patient privilege. The introduction of his statements to medical personnel under these circumstances deprived Freeman of due process of law under the Constitution.

Miranda rights protect suspects in custody from being coerced by law enforcement officials into giving incriminating evidence. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987); *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). *Miranda* generally does not apply to incriminating statements made to private persons in the absence of police subterfuge or intimidation. *Mauro*, 481 U.S. at 529-30; *Connelly*, 479 U.S. at 166; *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Generally, "coercive police activity is a necessary predicate to the finding that a [statement] is not 'voluntary.'" *Connelly*, 479 U.S. at 167.

In this case, Officer Swanner took advantage of a situation that *allowed the nursing staff to interrogate Freeman for him* and the circumstances were sufficiently coercive to invoke the protections of *Miranda* because Freeman was clearly in custody and subjected to coercive police activity: Freeman was injured; he was met at the hospital by Officers Swanner and Hart as Freeman sat in the ambulance; Officer Swanner was in full uniform and escorted Freeman into the hospital and to the ER bay; and Officer Swanner remained, uninvited, close to Freeman during the entire time Freeman received medical attention; and Freeman was compelled to answer the medical questions truthfully in order to ensure his health in the administration of medication.

Under these circumstances, Officer Swanner had sufficient participation in the questioning process to implicate the concerns of *Miranda*. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (interrogation is express questioning by the police or its functional equivalent). The questioning by the nursing staff, even though the nurses were not police officers, constituted the functional equivalent of express interrogation by Officer Swanner and as such, *Miranda*

warnings were required. *See Massiah v. United States*, 377 U.S. 201 (1964).

In this case, the police officers allowed the nursing staff to continue questioning Freeman about his medical condition for over an hour before finally administering the *Miranda* warnings at 01:00 a.m. Clearly, if Freeman was under arrest and "confined" to the ER bay at 10:48 p.m., as the record below clearly shows, he was constitutionally protected from interrogation by the police without first being advised of his rights.

REASONS FOR GRANTING THE WRIT

The detection, arrest, and prosecution of drunk/intoxicated drivers constitutes a nation-wide law enforcement priority and a devotion of considerable state and federal resources. Every state has laws prohibiting drunk driving and in many cases of fatality/injury accidents the accused/suspect is confronted by law enforcement either at the scene or later at the emergency room of the nearest hospital. These confrontations happen in the United States nearly every day and this Court must set some constitutional parameters on the conduct of police officers in these situations.

In addition, just last term in *Missouri v. Seibert*, 542 U.S. 600 (2004), this Court invalidated the sort of end-run around *Miranda* warnings engaged by the police officers in this case: obtaining inculpatory statements *first* without *Miranda* warnings, then, once the statements are obtained, administering *Miranda* warnings and obtaining the same statements in order to make the statements constitutionally admissible. In this case, the police accomplished the same ruse condemned by this Court in *Seibert*, but simply used ER nurses to conduct the questioning in the first instance. The

basic constitutional principles are the same and the actions of Officer Swanner in this case are equally repugnant to the Constitution as those of Officer Hanrahan in *Seibert*.

A. SCOPE OF THE PROBLEM

According to the National Highway Traffic Safety Administration press release of Monday, August 22, 2005, impaired driving is one of America's most often committed and deadliest crimes.[1] The NHTSA, citing the FBI's Uniform Crime Reports, published that more than 1.4 million people nationwide were arrested in 2003 for driving under the influence; and there were nearly 13,000 fatality highway crashes involving at least a driver or motorcycle rider with an illegal blood alcohol concentration (BAC) level of 0.08 or higher. *Id.*

The NHTSA projects that 510 persons will die in automobile crashes during the Labor Day holiday alone and about half of these will be alcohol-related.[2] The federal government, through the United States Department of Transportation has launched a campaign to highlight the problem called *You Drink & Drive, You Lose* dedicated to a nationwide "crackdown" on drunk driving that is "complemented by a $13.9 million national advertising campaign that puts drivers on notice that if they drive

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[1] This document can be found on the internet at the NHTSA's web site at the following URL: http://www.nhtsa.dot.gov/

[2] The focus of the NHTSA is on alcohol-related crashes whereas Freeman's case involves intoxication by morphine. However, the constitutional problem presented by these figures is the same for any intoxication whether by alcohol or some other substance.

impaired they will be caught and prosecuted." *See* footnote 1.

In addition, driving while impaired is illegal in every state and the NHTSA has cited studies showing that Americans consider drunk driving an important social issue, ahead of health care, poverty, the environment and gun control; and that "nearly every half hour someone dies in an alcohol-related crash[.]" *Id.* In 2003, 45 states, the District of Columbia and Puerto Rico had by law created a threshold making it illegal to drive with a BAC of 0.08 g/dl or higher.[3]

The NHTSA estimates that alcohol was involved in 40 percent of fatal crashes and in 7 percent of all crashes in 2003. *See* footnote 3. An estimated 275,000 persons were injured in crashes where police reported that alcohol was present–an average of one person injured approximately *every 2 minutes*. *Id.* Finally, approximately 1.5 million drivers were arrested in 2002 for driving under the influence of alcohol or narcotics: this is an arrest rate of 1 for every 130 licensed drivers in the United States. *Id.*

Clearly, the scope of the problem of persons driving under the influence of alcohol or narcotics extends to all states in the United States and both state and federal governments have devoted significant resources to combating the problem. The response of law enforcement when responding to the scene of a potential drunk driving accident is to acquire evidence against an accused at the scene or at the hospital, primarily in

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[3] *See* Traffic Safety Facts produced by the National Center for Statistics & Analysis which can be found in .pdf format at http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2003/809761.pdf.

the form of blood and/or breath draws (samples) that can be tested for substances, statements made by the accused (as in this case), and observation of the demeanor and physical condition of the accused.

Law enforcement perform these investigatory procedures at the hospital with little restrictions, particularly the ease with which police may access areas of treatment that would otherwise be off limits to the general public. These investigatory methods occur every day and just a brief sampling of recent state court opinions from around the country evidence the nation-wide scope and regularity with which such investigations are conducted at the hospitals in this country. *See, e.g., Hough v. State*, _ S.E.2d _, 2005 WL 2413094 (Ga., October 3, 2005); *People v. Cortez*, _ N.E.2d _, 2005 WL 2738319 (Ill. App., October 14, 2005); *Robinson v. State*, 835 N.E.2d 518 (Ind. App. 2005); *Battoe v. Commonwealth*, 2005 WL 2045437 (Ky., August 24, 2005); *State v. Anderson*, 693 N.W.2d 267 (Neb., February 24, 2005); *State v. Kramer*, 2005 WL 2648686 (N.J. Super. A.D., October 18, 2005) (Unpublished); *State v. Verrett*, 619 S.E.2d 593 (N.C. App. 2005) (Table); *State v. Moody*, 116 P.3d 935 (Or. App., August 3, 2005); *State v. Montgomery*, 2005 WL 2104835 (Tenn. Crim. App., September 1, 2005) (*slip op.*).

Clearly, the nature and extent of law enforcement investigatory methods in dealing with drunk driving cases is a subject which merits this Court's attention. Police officers following injured persons they suspect of drunk driving into hospital emergency rooms happens on a daily basis somewhere in the United States. The way it happened in Freeman's case was unconstitutional and this Court should devote its scarce resources to curbing the abuses of law enforcement in this area.

Moreover, as this Court recognized in *Missouri v. Seibert*, 542 U.S. 600, 609 (2004), the technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. *Seibert*, 542 U.S. at 609. This Court noted further that, although statistics were unavailable regarding the frequency of this practice, "it is not confined to Rolla, Missouri." The officer in *Seibert* testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. *Id*.

Thus, prior to this Court's decision in *Seibert*, the successive interrogation strategy was apparently in wide-spread use among law enforcement personnel in conducting custodial interrogations. Freeman urges this Court to consider the wide-spread use such a technique still enjoys in ***hospital emergency rooms*** across the country and to accept this case to curb the "end-run" around *Miranda* that occurred in this case.

B. THE TENTH CIRCUIT FAILED TO ACCORD PROPER RESPECT FOR THIS COURT'S DECISION IN *SEIBERT* UNDER THE FACTS OF THIS CASE.

In *Missouri v. Seibert*, 542 U.S. 600 (2004)[4] this Court held unconstitutional the police practice of obtaining

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[4] This Court decided *Seibert* after Freeman filed his Brief-in-Chief in the court of appeals below.

incriminating statements without *Miranda*[5] warnings and then, once the statements were obtained, attempting to sanitize the same statements by administering the *Miranda* warnings and then obtaining the statements a second time. This Court held such statements *inadmissible* and affirmed the Missouri Supreme Court which had condemned the police practice as an "end-run" around *Miranda* that would encourage law enforcement violations of *Miranda* and would diminish the role of *Miranda* in protecting the privilege of a citizen against self-incrimination. *See Seibert*, 542 U.S. at 606.

The police conducted a similar "end-run" around *Miranda* in Freeman's case and the principles undergirding the decision in *Seibert* apply equally in a situation such as Freeman's where he is not free to leave (in custody) and, even more importantly, is *compelled* to answer incriminating questions in order to receive emergency medical care in a hospital. *Seibert* logically applies in cases such as this one where the suspect (Freeman) is subject to a similar coercive atmosphere where law enforcement officers take advantage of the situation, let the medical personnel elicit the statements, and then turn around at a later time and attempt to constitutionally "clean" such statements by the administration of *Miranda* warnings.

The officers in Freeman's case could not ask Freeman directly the questions posed by the nursing staff at the ER; so, they simply used their authority to remain in the same room while the personal, medical, questions were being asked so they could hear the answers. The officers in Freeman's case clearly suspected Freeman of being under the influence from the time Freeman stepped foot inside the hospital ER—and in

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[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

fact arrested him in the ER while Freeman was being treated for his injuries. But rather than question Freeman directly, the officers simply let the nurses do the questioning while they watched and waited.

Moreover, the constitutional error is magnified in Freeman's case because, as the Tenth Circuit panel recognized in its factual recitation, the "implied consent" form read to Freeman by Officer Swanner "specifically precluded him from consulting with a lawyer before deciding whether to take the test." Appendix at 5a. The officers then let the nursing staff question Freeman while they listened. Freeman's answers, ***necessary for his proper medical treatment***, contained inculpatory statements. *See id.* at 5 (prior drug use; he was on morphine; he had injected opium). Yet, the officers present, having just advised Freeman that he had no right to a lawyer, did not administer proper *Miranda* warnings prior to the medical questioning.

Such questioning was, for *Miranda* and Fifth Amendment purposes, the "functional equivalent" of direct police questioning. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (interrogation means express questioning by the police or its functional equivalent). Freeman was in custody and not free to leave (he was under arrest according to the facts credited by the panel), injured in a car wreck, and was ***forced*** to answer the nurse's questions if he wanted proper treatment for his injuries. The police officers took unfair advantage of this situation by exerting police authority and remaining in the room during the questioning. Clearly, the nursing staff allowed the officers to remain ***only by virtue of them being police officers***.

Central to this Court's resolution of the issue in *Seibert* was distinguishing the similar situation that occurred in

Oregon v. Elstad, 470 U.S. 298 (1985), which this Court distinguished on the basis that the officer's actions in *Elstad* were in the nature of an oversight and a good-faith mistake rather than intentional omission of *Miranda* warnings for the purpose of obtaining incriminating statements. *Seibert*, 542 U.S. at 614. There was no such good-faith omission or oversight in Freeman's case. The police intended to listen to the medical conversation and in fact tape recorded the entire exchange.

The Tenth Circuit's opinion is particularly disturbing because it placed the onus ***on Freeman*** to affirmatively assert his rights and confront uniformed police officers about their presence in the examination room. *See* Appendix at 11a. ("[Freeman] knew of the officer's presence, but he did not ask them to leave before making his statements or indicate that his statements were being made in confidence."). Such a position is ***unconscionable***, violates Due Process, and must be remedied by the this Court.

The Tenth Circuit apparently expected Freeman, naked in a hospital gown, injured (broken arm, head injury, blood on his face) from the accident, and visibly intoxicated (according to the nurse) to call "time out" during his medical treatment and inquiry from the nurse, ***confront a uniformed police officer***, and engage the officer in a legal discussion concerning the officer's presence in the examination room prior to proceeding to being treated by the nurse for his injuries; rather than placing the onus ***on the State*** (the police officers) to observe legally recognized evidentiary privileges and nearly forty-year-old constitutional commands from this Court concerning advising a person in custody of their constitutional rights.

Moreover, the Tenth Circuit did not sufficiently convey, or give effect to, the coercive atmosphere attendant during Freeman's hospital visit. The police followed Freeman to the hospital. Officer Swanner confronted Freeman and told him, "Let's go inside [the ER]," and ***escorted*** Freeman to the ER. ***Another*** officer (Officer Hart) met them at the ER entrance and ***both*** of the officers escorted Freeman inside. They arrested him inside the ER. Officer Swanner was with Freeman "at all times." They read an official form to Freeman saying he was under arrest and that he could not consult with a lawyer.

Freeman had no rational choice under the circumstances ***other than to acquiesce to the presence of the police officers***; and expecting Freeman himself under those circumstances to affirmatively invoke his legal rights is simply asking too much and violates bedrock principles of fundamental fairness. ***The very purpose of the*** **Miranda** ***decision and its progeny is to recognize the coercive environment such as the one faced by Freeman and force the State to inform the person of their constitutional rights; not to force the person in custody (and in this case injured) to guess what his rights are and whether he should invoke them–particularly in a case such as this one where the police affirmatively told the lay person that he did not have the right to the advice of counsel***.

At bottom, the facts in Freeman's case mirror those in *Seibert* where there was a ***police strategy*** adapted to undermine the *Miranda* warnings. *Seibert*, 542 U.S. at 616. The panel opinion issued by the Tenth Circuit does not acknowledge the controlling authority of *Seibert* and denied Freeman's petition for panel rehearing and for rehearing *en banc* even when Freeman brought the controlling authority of *Seibert* to the court's attention. Freeman asks this Court to grant the writ, vacate the opinion of the Tenth Circuit, and

remand this matter for further consideration in light of *Seibert*.

C. CLARIFICATION OF *SEIBERT* IS NEEDED

Seibert produced an array of separate opinions and rationales from the members of this Court which have caused ambiguity in the lower courts concerning the scope of the holding in *Seibert*. *See, e.g., United States v. Terry*, 400 F.3d 575 (8th Cir. 2005) (police obtain incriminating statement without *Miranda* warnings, then re-interview the next day with *Miranda* and obtain the same statement; the Eighth Circuit held this was constitutionally permissible after canvassing the various opinions of individual Justices of this Court in *Seibert*).

The competing rationales in *Seibert* focus either on the willful actions of the police officer or on the effect on the suspect of being compliant in giving a statement a second time. It is not clear from this Court's opinion in *Seibert* which of these considerations is the more important in resolving constitutional questions in this context and the courts below are left to delve into the individual opinions of Justices of this Court and apply multiple rationales to this issue with no guiding constitutional principle. *See, e.g., Terry, supra*.

Freeman's case presents this Court with an opportunity to re-visit this issue and clarify the controlling constitutional principles, including whether the rationale of *Seibert* encompasses situations such as Freeman's where law enforcement uses non-police personnel (*i.e.*, emergency room nurses) to conduct the questioning in the first instance prior to the administration of *Miranda* warnings.

CONCLUSION

For the reasons stated above, the Petitioner prays respectfully that this Court grant his Petition for a writ of certiorari and review the opinion of the United States Court of Appeals for the Tenth Circuit.

DATED this 8th day of November, 2005.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04-6008

[Filed, July 11 2005]

DEREK KYLE FREEMAN, Petitioner-Appellant,	)
v.	)
JOHN GRUBBS, Warden; THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents-Appellees.	)

ORDER

Before LUCERO, McKAY, and ANDERSON, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

by:

Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04-6008

[Filed, June 6, 2005]

DEREK KYLE FREEMAN, Petitioner-Appellant,	)
v.	)
JOHN GRUBBS, Warden; THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents-Appellees.	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

State prisoner Derek Kyle Freeman appeals the federal district court's denial of his petition for habeas corpus relief filed under 28 U.S.C. § 2254. Upon jury trial, Freeman was convicted in Oklahoma state court of first-degree manslaughter, unlawful possession of a controlled substance and unlawful possession of drug paraphernalia. He was sentenced to twenty years, ten years and one year of imprisonment, respectively. On direct appeal he argued, among other things, that (1) the State's failure to arrest him before taking a blood sample rendered the sample and its test results inadmissible under Okla. Stat. tit. 47, § 751, and admission of the evidence violated his constitutional rights; (2) admission of various testimony violated the physician-patient privilege and denied him due process and a fair trial; and (3) cumulative error denied him due process and a fair trial. The Oklahoma Court of Criminal Appeals (OCCA) rejected these arguments and summarily affirmed Freeman's convictions and sentences. In post-conviction proceedings, the state court modified Freeman's sentence by suspending the sentences imposed for the possession offenses. The OCCA affirmed.

Freeman then sought federal habeas corpus relief, raising the same arguments he raised in his direct appeal. The federal district court, adopting the magistrate judge's recommendation, denied habeas relief. The district court also denied Freeman's request for a certificate of appealability (COA). We granted a COA on only three of the issues Freeman sought to assert on appeal: (1) Did the presence of two officers in the emergency room during Freeman's medical treatment result in the unauthorized taking of his blood? (2) Were Freeman's constitutional rights violated by the admission of statements he made to medical personnel? and (3) Was there cumulative error? Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we **AFFIRM** the denial of habeas relief.

The incidents leading to Freeman's arrest began about 9:00 p.m. on March 16, 1998, when Freeman was driving a vehicle that crossed the center line of a Norman, Oklahoma street and collided head-on with another vehicle driven by the victim, Elizabeth Boyls. Freeman was unconscious for about ten minutes after the accident, and Boyls was also unconscious and injured. Both were transported by ambulance to Norman Regional Hospital, with Freeman riding in the front seat of the ambulance. Boyls later died from a heart rupture caused by the impact of the accident.

Norman Police Officers Paul Swanner and Matthew Hart met the ambulance at the hospital. The officers testified that, when the ambulance arrived, they saw Freeman make motions with his hands suggesting he was putting something down his pants. When asked what he was doing, Freeman replied that he was taking off his seat belt. When Freeman got out of the ambulance, the officers observed that he was unsteady on his feet, was unresponsive to their questions, had a distant look in his eyes, and spoke in a thick and gravelly voice. Believing that he was under the influence of intoxicants, and in light of the serious nature of the accident, the officers decided to obtain a blood sample for analysis.

While Officer Hart was out of the room, Officer Swanner read Freeman the Implied Consent Test Request. The request advised Freeman that he had been arrested and that the arresting officer believed that he had been under the influence of intoxicants when operating his motor vehicle. The form used also requested Freeman's agreement to submit to a test for the presence of intoxicants and specifically precluded him from consulting with a lawyer before deciding whether to take the test. It further informed Freeman that failure to consent would result in revocation of his driver's license. After hearing the entire Implied Consent Test Request read to him, Freeman agreed to

the blood test. The blood tests later showed both morphine and methadone in Freeman's blood.

Officer Swanner testified that Freeman's blood was drawn at 10:48 p.m. When Officer Hart returned to the room, he filled out the Oklahoma Department of Public Safety form concerning the blood test, noting a later arrest time of 10:54 p.m. At trial, Officer Swanner could not explain the time discrepancy. However, Officer Hart testified that he noted the arrest time after consulting his watch and that Officer Swanner had told him that he had already read the Implied Consent Test Request to Freeman.

After Freeman had agreed to take the test, Nurse Brigitte Squyres was preparing to draw Freeman's blood when she noticed marks on Freeman's arm. On questioning by her, he admitted to prior drug use, as recently as a year before. Nurse Squyres also noticed Freeman had slurred speech and reacted slowly to her questions. When she asked him to disrobe, she observed that he became nervous and agitated. When Freeman removed his underwear, two syringes and a Tic-Tac container containing fourteen morphine tablets fell out. Officer Swanner took possession of these items, as well as a spoon, cotton balls and a green pill found in Freeman's clothing.

Eventually, Freeman admitted to Nurse Squyres that he was on morphine, and he told another nurse, Bryan O'Rourke, that he had injected opium. Nurse O'Rourke believed that Freeman was intoxicated because of the appearance of his eyes, his slow functioning, his slow or slurred speech, and his intermittent incoherence.

At 1:00 a.m., during a break in Freeman's medical treatment, Officer Swanner read Freeman his Miranda[1] rights. Freeman then agreed to discuss the accident and later gave a written statement. His statement indicated that earlier that day, he had purchased morphine and had injected eighty-five milligrams of the drug. He also stated that he had slept only five hours in the prior three days and admitted that due to his lack of sleep he had had difficulty staying awake while he was driving his vehicle that night, that he had faded out, that he had drifted across the center line, and that he had awakened only after the accident had occurred.

If a claim is adjudicated on the merits in state court, we grant habeas relief only if the state-court decision was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(1), (2). Federal courts presume that state court factual findings are correct, and place the burden on the petitioner to rebut that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). If the state court did not decide a claim on its merits, a federal appellate court reviews the district court's legal conclusions de novo and its factual findings for clear error. *Darks v. Mullin,* 327 F.3d 1001, 1007 (10th Cir. 2003).

Before us, Freeman argues that the blood test evidence was inadmissible under state law because he had not been arrested at the time the blood was drawn. *See Post v. State ex rel. Dep't of Pub. Safety*, 1995 OK CIV APP 4, 889 P.2d 1290, 1291-92

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[1] *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

(Okla. Ct. App. 1995) ("Oklahoma law requires, and appellate decisions of this state have consistently held, a valid arrest is necessary to authorize a police officer to request submission to chemical tests for blood alcohol."). He maintains that, because the affidavit prepared by Officer Hart showed a 10:54 p.m. arrest time, he had not actually been arrested at 10:48 p.m. when his blood was drawn. In addition to the state law argument, Freeman also argues that his due process right was violated when the State failed to follow its rule requiring an arrest before taking blood. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, 65 L. Ed. 2d 175, 100 S. Ct. 2227 (1980).

Federal courts do not grant habeas relief for state-law errors. *Estelle v. McGuire*, 502 U.S. 62, 67, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991). If a state fails to follow its own rules, the failure gives rise to habeas relief only if the failure also was a violation of the due process guaranteed by the Constitution. *Hicks*, 447 U.S. at 346. To prove a denial of due process under *Hicks*, a habeas petitioner must show "the deprivation occasioned by the state's failure to follow its own law [is] arbitrary in the constitutional sense; that is, it must shock the judicial conscience." *Aycox v. Lytle*, 196 F.3d 1174, 1180 (10th Cir. 1999) (quotation omitted).

On direct criminal appeal, Freeman argued both that admission of the blood test evidence violated Okla. Stat. tit. 47, § 751 and that it violated his right to due process. The OCCA denied the claim, finding that Freeman was lawfully arrested prior to the extraction of his blood for testing.[2]

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[2] Freeman argues that we should review this claim de novo. We disagree. In listing the issues, the OCCA recognized that Freeman had raised a constitutional claim. Although the court did not discuss the constitutional claim specifically when addressing this issue, its ruling encompasses it, and we still give deference to its decision. *See Paine*

We conclude that there was no due process violation. In order to prevail on his habeas claim, Freeman must show by clear and convincing evidence that the OCCA's factual determination that he was arrested prior to his blood draw was in error. § 2254(e)(1). To the contrary, in his appellate brief's statement of facts, Freeman acknowledges the following sequence of events. Nurse Squyres went to get the blood kit, Officer Swanner read the Implied Consent Test Request, Freeman consented to the blood draw, and Nurse Squyres drew his blood. The Implied Consent Test Request, which was read to Freeman, clearly stated that he was under arrest. In light of Officer Hart's testimony that he noted the arrest time by looking at his watch after his return to the ER bay and after Officer Swanner had read the Implied Consent Test Request to Freeman, the record evidence does not support a conclusion that OCCA's factual finding is in error. Furthermore, Freeman does not argue that his blood was drawn before Officer Swanner read the Implied Consent Test Request or before he had actually given his consent. Because the record shows that Freeman was arrested before his blood was drawn and because there was no failure of the State to follow its own rules, there was no due process violation. *See generally Schmerber v. California*, 384 U.S. 757, 768-70, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966) (concluding police were justified in requiring person to submit to blood test

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v. Massie, 339 F.3d 1194, 1198 (10th Cir. 2003) ("Even if a state court resolves a claim in a summary fashion with little or no reasoning, we owe deference to the state court's result."); *Cook v. McKune*, 323 F.3d 825, 831 (10th Cir. 2003) (recognizing federal courts give deference to state-court decisions even if state court did not discuss and may not have been aware of Supreme Court precedent; relying on *Early v. Packer*, 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002) (per curiam)). Even if we were to conclude that the OCCA did not address the constitutional claim on its merits, on de novo review, *see Darks*, 327 F.3d at 1012, we would still affirm.

because person was under arrest and circumstances indicated likelihood of success of test for alcohol). Accordingly, we conclude the OCCA's decision was not contrary to or an unreasonable application of Supreme Court precedent; nor was it based on an unreasonable determination of the facts in light of the evidence presented. See 28 U.S.C. § 2254(d)(1), (2).

Freeman also argues to us that his statements were protected by the physician/patient privilege set forth in Okla. Stat. tit. 12, § 2503 and that their admission violated his constitutional right to due process. He maintains that his constitutional rights were violated because, although he made statements in the officers' presence, he had never consented to their presence, but had merely acquiesced because he had no choice in order to obtain medical treatment.

The OCCA rejected this argument. The court found that Freeman's statements to the nurses were not privileged communications under Okla. Stat. tit. 12, § 2503. Citing § 2503(A)(4), the court found that, because Freeman made the statements in the presence of officers who clearly were not involved in the medical diagnosis or treatment, Freeman did not intend for his comments to be confidential. Lastly, the court found that the nurses' testimony about Freeman's demeanor was properly admitted and relevant to the intoxication issue.[3]

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[3] Freeman also argues that this claim should be reviewed de novo. Again, we disagree. The OCCA recognized that Freeman raised a constitutional claim. Because that court found no state-law error, it follows that the court decided there could be no constitutional error. Under these circumstances, see n.2 supra, we give deference to the OCCA's decision. But even if we were to review de novo, we would affirm.

"State court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." *Walker v. Gibson*, 228 F.3d 1217, 1239 (10th Cir. 2000) (quotation omitted), overruled on other grounds by *Neill v. Gibson*, 278 F.3d 1044, 1057 n.5 (10th Cir. 2001). Nothing in the record indicates Freeman was deprived of a fair trial. He knew of the officer's presence, but he did not ask them to leave before making his statements or indicate that his statements were being made in confidence.

As for Freeman's argument that he has a due process right to have the state courts follow state procedural and substantive rules, *see Hicks*, 447 U.S. at 346, because there was no violation of state rules, it follows that there was no violation of his due process rights. Accordingly, we conclude Freeman cannot show by clearly established Supreme Court precedent that admission of his statements resulted in any fundamental unfairness or denied him due process of law.

Finally, Freeman argues that the cumulative errors in this case denied him a fundamentally fair proceeding and due process. Finding no individual error, the OCCA decided there can be no accumulation of error. "A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990). "Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors." *Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998). Because there was no error, the OCCA's conclusion that there was no cumulative error was not contrary to or an unreasonable application of Supreme Court precedent.

The judgment of the district court is **AFFIRMED**.

Entered for the Court
Carlos F. Lucero
Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

No. CIV-02-0863-HE

[Filed, December 12, 2003]

DEREK KYLE FREEMAN,	)
Petitioner,	)
	)
v.	)
	)
TIM O'DELL, Warden	)
Respondent.	)
	)

JUDGMENT

In accordance with the order entered on this date, petitioner's petition for writ of habeas corpus is **DENIED.**

IT IS SO ORDERED.

Dated this 12th day of December, 2003.

/s/_____
Joe Heaton
United States District Judge

ENTERED ON DOCKET: December 12, 2003

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

No. CIV-02-0863-HE

[Filed, December 12, 2003]

DEREK KYLE FREEMAN,
Petitioner,

v.

TIM O'DELL, Warden
Respondent.

ORDER

Petitioner, a state prisoner appearing with counsel, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Consistent with 28 U.S.C. § 636(b)(1)(B), the matter was referred to Magistrate Judge Gary M. Purcell who issued his Report and Recommendation, recommending that habeas corpus relief be denied. Specifically, Judge Purcell concluded that the Oklahoma Court of Criminal Appeals' decision rejecting petitioner's claims was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding and was neither contrary to, nor an unreasonable application of, clearly established Federal law, as determined by the Supreme

Court of the United States. See 28 U.S.C. § 2254(d). With respect to the state law issues raised by petitioner in grounds one, three, six and seven, Judge Purcell concluded that petitioner's claims of state law error did not entitle him to habeas corpus relief. With respect to the constitutional issues raised by petitioner, Judge Purcell concluded that: (1) the legality of petitioner's arrest was sufficiently established and the results of petitioner's blood test were properly admitted at trial; (2) petitioner's convictions for manslaughter and drug possession did not violate petitioner's Fifth Amendment double jeopardy rights or his rights under 21 Okla. Stat. § 11; (3) the admission of petitioner's statements to hospital personnel did not violate his right to due process; (4) the admission of petitioner's pre-Miranda[1] statements did not violate his constitutional rights; (5) the admission of petitioner's taped statements was proper as no violation of the Wiretap Act[2] occurred; (6) there was no accumulation of error entitling petitioner to relief; (7) no error occurred in failing to hold a pretrial *Daubert*[3] hearing; and (8) petitioner was not deprived of the effective assistance of counsel. Petitioner has objected to the Report and Recommendation, re-urging the same arguments presented to Judge Purcell.[4]

Having reviewed the entire record, including petitioner's objection to the Report and Recommendation, in conjunction

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966)

[2] Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. §§ 2510-2522.

[3] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

[4] Because petitioner has objected to the Report and Recommendation, the matter is reviewed de novo. 28 U.S.C. § 636(b)(1)(C).

with the applicable law, the Court concurs with Judge Purcell's analysis of petitioner's grounds for relief. Accordingly, the Court ADOPTS the Report and Recommendation in its entirety and DENIES the petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated this 12th day of December, 2003.

/s/_____
Joe Heaton
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

No. CIV-02-0863-HE

[Filed, May 23, 2003]

DEREK KYLE FREEMAN,	)
Petitioner,	)
	)
v.	)
	)
TIM O'DELL, Warden	)
Respondent.	)
	)

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, brings this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Petitioner is challenging the convictions for Manslaughter in the First Degree, Possession of Controlled Dangerous Substance (morphine), and Possession of Drug Paraphernalia entered against him in the District Court of Cleveland County, Case No. CF-98-454, for which Petitioner is serving a twenty-year term of imprisonment and consecutive, suspended sentences of ten-years and one-year, respectively. Respondent has responded to the Petition and filed the state court record, including the original record ("OR ____") and trial transcript

("TR ___"). The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(l)(B). For the following reasons, it is recommended that the Petition be denied.

I. Background

Following a fatal collision in which Petitioner, who was driving on a rain-soaked street in Norman, Oklahoma, on March 16, 1998, hit a car head-on being driven by the victim, Petitioner was charged with the three offenses described above. Petitioner retained private counsel, and the charges were tried before a jury on April 5-9, 1999. During the trial, Petitioner's written and oral confessions were presented to the jury. In his statements, Petitioner confessed that he had injected morphine prior to driving to Norman just before the collision and thought he had passed out and crossed the center line. (TR 329, 806-809). While he was being treated at the hospital and in the presence of the arresting officer, two syringes and a "Tic-Tac" box containing morphine pills, cotton balls, and a spoon fell out of his underwear. (TR 780-781, 809-810, 953). The jury convicted Petitioner of all three charges and assessed punishment of twenty years of imprisonment on the first degree manslaughter charge, 10 years of imprisonment on the drug possession charge, and one year of imprisonment on the drug paraphernalia possession charge. On July 7, 1999, Petitioner was sentenced consistent with the jury's assessment to consecutive sentences totaling thirty-one years of imprisonment. Petitioner then retained new counsel and filed a Motion for 120 Day Judicial Review of Sentencing and/or Motion for Concurrent Sentences under Okla. Stat. tit. 22, §982a, which the trial court denied. (OR 388, 430).

Petitioner appealed the convictions, raising the same claims for relief he raises herein. In a summary opinion, the Petitioner's convictions were affirmed by the Oklahoma Court of

Criminal Appeals ("OCCA"). Response, Ex. D (Freeman v. State, No. F-1999-950(Okla. Crim. App. Sept. 8, 2000)). A petition for rehearing was denied. Response, Ex. F. Petitioner subsequently filed in the trial court a Motion for Suspended Sentence After Appeal and/or Motion for Concurrent Sentences pursuant to Okla. Stat. tit. 22, §994. (OR 433). The motion was denied. (OR 467). On September 5, 2001, Petitioner filed an application for post-conviction relief in the trial court. Response, Ex. G. As grounds for relief, Petitioner urged the trial court to order that his sentences run concurrently rather than consecutively and/or to suspend his sentences either totally or partially under Okla. Stat. tit. 22, §991(a) so that he could obtain drug treatment. On February 13, 2002, the trial court entered an Order Modifying Judgment and Sentence and Making Specific Findings of Fact and Conclusions of Law in which the trial court ordered that Petitioner's sentences be modified to the extent that the sentences for the drug possession and paraphernalia possession convictions be suspended so long as Petitioner complies with the specific rules and conditions of probation set forth in the Order. Response, Ex. H. The state appealed this decision, but the OCCA, with one dissenting vote, denied the state's request for post-conviction relief. Response to Order of May 7, 2003 (Doc. # 15).

II. Petitioner's Claims

In the instant Petition, Petitioner raises eight grounds for habeas relief, including

(1) "The state's failure to arrest prior to the blood taking rendered the blood results inadmissable in violation of 47 O.S. 751 et seq. and the motion to suppress should have been sustained, as the evidence was violative of Oklahoma statutes, Oklahoma Constitution articles 2 sections 7 and 30, as well as

the fourth and fourteenth amendments of the United States Constitution, requiring reversal;"

(2) "It was a violation of fifth amendment double jeopardy to convict on count 1 - manslaughter in the first degree by operating a motor vehicle while under the influence of morphine and count 2 - possession of morphine at the same time and place;"

(3) "It was a violation of the physician/patient privilege for the court to allow the testimony of nurses O'Rourke and Squyers against defendant, as well as the testimony of state's witness Hayden as to his review and interpretation of defendant's injuries, which were prejudicial and contributed to the convictions and sentences in violation of Oklahoma case law, statutes and Constitution, which constituted fourteenth amendment due process [sic] and denial of fair trial;"

(4) "If appellant [sic] was arrested or in custody at the hospital, then his admissions/statements to hospital personnel and/or officers were inadmissable as he had not received his Miranda rights when he was 'seized' and unaware they could be used against him in violation of his fourth, fifth, sixth and fourteenth amendment constitutional rights;"

(5) "Officer Swanner's clandestine tape recordings of the oral communications between appellant [sic] and nurses O'Rourke and Squyers was a violation of the 'Wire and Electronic Communications Interception and Interception of Oral Communications' Act 18 U.S.C. 2510 et seq. and inadmissible in a court of law;"

(6) "The accumulation of irregularities and errors denied appellant [sic] a fair trial and due process in violation of his fifth, sixth, and fourteenth amendment rights;"

(7) "The trial court erred in failing to hold a pretrial Daubert hearing where the state sought admission of the scientific or technical evidence of first impression quantitation [sic] of morphine by the OSBI, the reliability of which this court has not considered and the reliability herein was insufficient in violation of Taylor v. State and fourteenth amendment due process;"

(8) "Appellant [sic] was denied effective assistance of counsel at trial in violation of his sixth and fourteenth amendment rights."

Brief of Petitioner in Support of Writ for Habeas Corpus.

Respondent has responded in opposition to the Petition, contending that the habeas Petition should be denied.

III. Standard of Review

Petitioner has raised the same grounds for relief he asserted in his direct appeal before the OCCA, and the OCCA rejected each of his claims on their merits. Under these circumstances, habeas relief may be awarded only if the OCCA's adjudication of the same claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d). This standard directs the focus of judicial review to the state appellate court's decision. Matteo v. Superintendent, 171 F.3d 877, 885 (3d Cir.), cert. denied sub nom. Matteo v. Brennan, 528 U.S. 824 (1999). Thus, federal courts reviewing habeas claims that have previously been resolved on the merits in state courts must apply a "level of 'deference to the determinations of state courts,' provided those determinations did not conflict with federal law

or apply federal law in an unreasonable way." Williams v. Taylor,529 U.S. 362, 386 (2000)(quoting H. R.Conf.Rep.No. 104-518, p. 111 (1996)). A state court decision is "contrary to"' established Supreme Court precedent if the state court either (1) reaches a conclusion opposite to that reached by the Supreme Court on a question of law or (2) decides an issue differently than the Supreme Court has on a set of materially indistinguishable facts. Id. at 405-406. A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal principle from Supreme Court jurisprudence but unreasonably applies that principle to the facts of the case. Id. at 407. "The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and, an unreasonable application is different from an incorrect one." Bell v. Cone, 535 U.S. 685, 694 (2002).

IV. State Law Issues

In asserting his eight grounds for relief, Petitioner has made no effort to differentiate the federal law issues that may be raised in a federal habeas proceeding from the purely state law issues he raised in his direct appeal that are not cognizable on federal habeas review. Petitioner raises violations or errors of state law in grounds one, three, six, and seven. The OCCA relied entirely on state law in deciding these same issues raised by Petitioner in his direct appeal.

It is well established that the federal writ of habeas corpus reaches only convictions obtained in violation of the United States Constitution, laws, or treaties. *E.g.*, Mabry v. Johnson, 467 U.S. 504, 507 (1984); Pulley v. Harris, 465 U.S. 37, 41 (1984); Smith v. Phillips, 455 U.S. 209, 221 (1982); Brinlee v. Crisp, 608 F.2d 839, 843 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). See also King v. Champion, 55 F.3d 522, 527

(10th Cir. 1995) ("This court may not correct errors of state law made by state courts."). In this regard, the Supreme Court has stated that "[f]ederal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Smith, 455 U.S. at 221. Having reviewed the record of Petitioner's trial, it is clear Petitioner cannot show that the state court errors of which he complains "'deprived him of fundamental rights guaranteed by the Constitution of the United States.'" Jackson v. Shanks, 43 F.3d 1313, 1317 (10th Cir.)(quoting Brinlee, 608 F.2d at 843), cert. denied, 525 U.S. 950 (1998). Accordingly, Petitioner is not entitled to habeas relief concerning his claims of purely state law errors or violations raised in grounds one, three, six, and seven in the Petition.

V. Validity of Arrest

Although Petitioner raises only a state law issue in Proposition No. 1 as it is stated in the Petition and Brief in Support of the Petition, within this argument Petitioner submits a wholly unsupported allegation that the state "totally failed" to establish the legality of Petitioner's arrest. An arrest is lawful if the arresting officer has probable cause to believe that the individual has committed a criminal offense. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001)(extending probable cause standard even to "very minor criminal offense in [officer's] presence"); Florida v. White, 526 U.S. 559, 565 (1999)("Fourth Amendment permits warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred").

The officer who arrested Petitioner, Officer Swarmer, testified that when he arrived at the Norman Regional Hospital on the night of the collision involving Petitioner that Petitioner had an unsteady gait, spoke with a thick, gravelly voice, and his

eyes seemed distant, all signs that in the officer's experience showed Petitioner was under the influence of intoxicants. (TR 767-771). The other officer present that night, Officer Hart, testified that Petitioner stumbled out of the ambulance, was unresponsive to the officers' questions, was unsteady, and appeared to be intoxicated. (TR 842-843). There was sufficient probable cause to support Petitioner's arrest, which occurred prior to the nurse's extraction of Petitioner's blood for testing. (TR 773-776, 783, 785). Accordingly, the OCCA's decision that Petitioner was lawfully arrested prior to the extraction of blood for testing, and that the blood test evidence was therefore properly admitted as a search incident to the arrest, was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. See Schmerber v. California. 384 U.S. 757, 772 (1966)(admitting evidence obtained from a warrantless blood test taken in a hospital setting in a drunk driving trial did not violate the Fourth Amendment). Petitioner is not entitled to habeas relief concerning this claim.[1]

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[1] Respondent mistakenly asserts Petitioner was required to exhaust his contention that he was not afforded a "full and fair" state court hearing on the Fourth Amendment issue raised in ground one. Stone v. Powell, 428 U.S. 465(1976), contemplates that where state prisoners have been afforded "full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct appeal" then the "state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Id., at 489-494. Petitioner did not raise a Fourth Amendment issue in the trial court and relied instead solely on state law governing the admission of evidence of blood testing. In Petitioner's direct appeal, the OCCA reviewed Petitioner's claim that the blood testing evidence should have been suppressed and rejected the claim on its merits. Although the OCCA recognized that the Fourth Amendment was a basis for Petitioner' s claim, the OCCA did not expressly state that its holding was based on federal law. Under these circumstances,

VI. Double Jeopardy

In his second ground for habeas relief, Petitioner contends that his Fifth Amendment double jeopardy rights were violated when he was convicted on both the manslaughter charge (count one) and the drug possession charge (count two). Petitioner also alleges that his convictions on these two charges violated his rights under Okla. Stat. tit. 21, §11 and Oklahoma Constitution Art. II, §7 and §21. The OCCA rejected this same claim, finding that "Counts I and II are two separate and distinct crimes, required proof of different facts, and are not facets of one another." Response, Ex. D, at 3.

Petitioner's claim invokes the Fifth Amendment's Double Jeopardy Clause which protects "against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989). This protection is limited to "ensur[ing] that the sentencing discretion of courts is confined to the limits established by the legislature" because only the legislature has "the substantive power to prescribe crimes and determine punishments." Ohio v. Johnson, 467 U.S. 493, 499 (1984). In Oklahoma, a statutory double jeopardy provision, Okla. Stat. tit. 21, §11, "'is indicative of legislative intent." Cummings v. Evans,161 F.3d 610, 615 (10th Cir. 1998), cert. denied, 526 U.S. 1052 (1999). In evaluating the double jeopardy issue of"whether a state legislature intended to prescribe cumulative punishments for a single criminal incident, [courts] are bound by a state court's determination of the legislature's intent." Birr v. Shillinger, 894 F.2d 1160, 1161 (10th Cir.), cert. denied, 496 U.S. 940 (1990). "In other words, if the highest state court determines that the legislature intended to punish separate

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the undersigned declines to apply the Stone preclusion rule.

offenses cumulatively, a federal habeas court must defer to that conclusion." Cummings, 161 F.3d at 614. Accord, Lucero v. Kerby, 133 F.3d 1299, 1316(10th Cir. 1998). The OCCA clearly and expressly rejected Petitioner's double jeopardy claim and found that no violation of Okla. Stat. tit. 21, §11 occurred. This Court must defer to that highest state court's ruling on the state-law-based double jeopardy claim.

In Oklahoma, the offense of manslaughter in the first degree requires proof that the homicide was "perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor." Okla. Stat. tit. 21, §711(1). The offense of unlawful possession of a controlled dangerous substance requires proof of knowing or intentional possession of a controlled dangerous substance, in this case a Schedule II substance (morphine) not obtained with a valid prescription or practitioner's order. Okla. Stat. tit. 63, §2-402(B)(1).

Because each of the these offenses requires an element of proof not required in the other offense, no constitutional deprivation is shown under the traditional double jeopardy test established in Blockburger v. United States, 284 U.S. 299, 304(1932). Therefore, the OCCA's rejection of this claim was not contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court, and Petitioner is not entitled to habeas relief as to this claim.

VII. Admission of Petitioner's Statements to Hospital Personnel

In ground three of the Petition, Petitioner alleges that his right to due process was violated by the admission into evidence of his privileged statements to nurses and a doctor at the Norman hospital while he was being treated following the collision.

In Jaffee v. Redmond, 518 U.S. 1 (1996), the Supreme Court concluded as a matter of federal common law that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure." Id., at 15. However, the Supreme Court's conclusion in Jaffee did not create any constitutional entitlement to the exercise of a physician-patient privilege in state criminal proceedings. No such constitutional entitlement has been recognized by the Supreme Court. See Maness v. Myers, 419 U.S. 449, 592 n. 8 (1975)(noting that "[t]he constitutional basis for th[e Fifth Amendment privilege against self-incrimination] distinguishes it from other privileges established by state statute or common law such as those arising from the relation of priest and penitent, lawyer and client, physician and patient, and husband and wife.").

Petitioner moved before trial to preclude the admission of evidence of statements he had made to nurses and the doctor at the Norman hospital on the basis that the statements violated his physician-patient privilege. (OR 225-228). The trial court denied the motion. (OR 241-242). Petitioner raised the issue again on appeal, and the OCCA concluded that the statements Petitioner made to the nurses were not covered by the state's evidentiary privilege for confidential physician-patient communications. Additionally, the OCCA found that Petitioner "did not intend for his communications to be confidential as he made them in the presence of third persons who were not necessary or involved in his diagnosis and treatment, and therefore no violation of privilege occurred by virtue of police officers' presence during his examination." Response, Ex. D, at 4. See Okla. Stat. tit. 12, §2503(A)(4). The OCCA also found that Petitioner's communications with the doctor fell within a statutory exception to the physician-patient privilege. Response, Ex. D, at 4. Thus, the OCCA concluded that the admission of Dr. Hayden's testimony as to his conversations with and treatment of Petitioner

did not violate the physician-patient privilege under state evidentiary law. The OCCA's decision in this regard is not contrary to, or an unreasonable application of, clearly established Supreme Court jurisprudence. Accordingly, Petitioner is not entitled to habeas relief concerning this claim.

VIII. Admission of Petitioner's Statements under Miranda

In ground four of the Petition, Petitioner asserts that his constitutional rights were violated by the admission of statements he made to hospital personnel and to law enforcement officers before officers read him his rights under Miranda v. Arizona, 384 U.S. 436(1966).

In Miranda, the Supreme Court established the principle that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444. The Supreme Court defined custodial interrogation as any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id.

Petitioner contends that as soon as he was arrested he was entitled to be apprised of his Miranda rights. Petitioner moved before trial to preclude admission of any statements made by him in the hospital room following the collision and before he was given the Miranda warnings. (OR 228-230). The trial court denied the motion. (TR 241-242). In a Jackson v. Denno, 378 U.S. 368 (1964), hearing conducted without the jury and again at trial Officer Swarmer testified that he read Petitioner the Miranda warnings only after medical personnel informed him that it was all fight for him to talk with Petitioner. (TR 322-323, 782-783,794-795). After reading Petitioner the Miranda

warnings, Officer Swanner testified that Petitioner agreed to speak with the officers. (TR 324, 796). The officer testified that only medical personnel questioned Petitioner prior to the reading of the Miranda rights. (TR 339, 782). The OCCA rejected this claim in Petitioner's direct appeal. The OCCA concluded that the Miranda warnings were not required during the period of time that Petitioner was making statements to nurses because he was not undergoing questioning initiated by law enforcement officers and his statements were voluntarily made. Response, Ex. D, at 4. The OCCA's findings are consistent with the trial record. Petitioner was read the Miranda warnings before he was interrogated by law enforcement officers and he voluntarily agreed to speak with the officers. The OCCA's decision is not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, and Petitioner is not entitled to habeas relief as to this claim.

IX. Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. §2510

In his fifth ground for habeas relief, Petitioner asserts that the admission into evidence of Officer Swanner's taped recordings of his oral statements to hospital personnel violated the Wire and Electronic Communications Interception and Interception of Oral Communications Act codified at 18 U.S.C. §2510-2522 ("Wire Act"). The trial record reflects that Officer Swanner carried a tape recorder with him into the hospital room in which Petitioner was being treated after the collision. Officer Swanner testified that it was the policy of the Norman Police Department for officers to tape encounters with suspects in order to lower complaints of improper police conduct. (TR 776-777). Officer Swanner turned the tape recorder on while the nurse was talking to Petitioner, after his blood had been drawn. (TR 777).

The Wire Act prohibits the unauthorized interception and disclosure of oral communications. 18 U.S.C. §2511. The Wire Act defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such exception, but such term does not include any electronic communication." 18 U.S.C. §2510(2). The issue raised by Petitioner's claim is whether Petitioner had a reasonable or justifiable expectation of privacy during the taping of his conversations with hospital personnel. See United States v. McKinnon, 985 F.2d 525, 527 (11th Cir.)(under Wire Act, "statutory and constitutional test is whether a reasonable or justifiable expectation of privacy exists"), cert. denied, 510 U.S. 843(1993). The OCCA concluded that the taping by Officer Swarmer did not violate the Wire Act. The trial record clearly shows that Petitioner was arrested and confined to a hospital room in the presence of law enforcement officers at the time that Officer Swanner began taping his statements. Petitioner had no reasonable or justifiable expectation of privacy under these circumstances, and the Wire Act was not violated. The Supreme Court has not held that the Wire Act is violated under similar circumstances. The OCCA's decision is not contrary to, or an unreasonable application of, clearly established Supreme Court jurisprudence, and as to this claim Petitioner is not entitled to habeas relief.

X. Cumulative Errors

In ground six, Petitioner contends that the accumulation of errors in his trial denied him due process. However, no constitutional error has been found.

Within this claim of cumulative errors, Petitioner alleges a trial error occurred in the admission of testimony by Dr. Sandhu on redirect examination that he had conducted an additional test

to quantify the amount of morphine in Petitioner's blood using the blood sample taken from Petitioner at the hospital on the night of the collision. The trial record shows that on direct examination, Dr. Sandhu, who is a certified forensic drug analyst, testified that he used the gas chromatograph mass spectrometer ("GCMS") method to quantify the amount of morphine in Petitioner's blood and that he determined there were 95 nanograms of morphine per milliliter of Petitioner's blood. (TR 1087-1096). On cross-examination, defense counsel asked Dr. Sandhu if he ran two tests on Petitioner's blood, and he responded affirmatively. (TR 1130). On redirect, Dr. Sandhu was again asked if he ran two tests on Petitioner's blood, and he responded affirmatively and testified that the results were substantially the same on both tests. (TR 1144). On recross, Petitioner objected that the second test result was not provided in pre-trial discovery. (TR 1144). The trial court overruled the objection on the basis that the testimony was not offered in direct examination. (TR 1144-1145). The OCCA rejected this claim on the basis that "no error occurred in this case because [the testimony] was not material, and would not have changed the defense strategy or his theory of the case." Petitioner has not shown that this alleged trial error rendered his trial so fundamentally unfair that he was denied a constitutional guarantee. The OCCA's decision is not contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court. Petitioner is not entitled to habeas relief concerning this claim.

XI. Necessity for Daubert Hearing

In his seventh ground for habeas relief, Petitioner urges that the trial court erred by failing to hold a pre-trial heating to consider the reliability of the evidence presented through the testimony and reports of Dr. Sandhu as to the amount of morphine in Petitioner's blood. Petitioner contends that under

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Taylor v. State, 889 P.2d 319, 339(Okla. Crim. App. 1995), the trial court was required to hold such a hearing, and that the trial court's failure to hold a Daubert hearing denied him due process and violated. Taylor.

In Daubert, the Supreme Court concluded that the Federal Rules of Evidence, especially Rule 702, "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." Daubert, 509 U.S. at 597. In Taylor, the OCCA adopted the "more structured and yet flexible admissibility standard set forth in Daubert" for determining "questions involving the admissibility of expert testimony describing novel scientific evidence." Taylor, 889 P.2d at 328-329.

In Petitioner's direct appeal, the OCCA found that Petitioner did not request a pretrial hearing to consider this evidence and did not object to the admission of Dr. Sandhu's testimony concerning his analysis of Petitioner's blood. Nevertheless, the appellate court reviewed the issue for plain error and found that no plain error occurred because the quantitative testing performed by Dr. Sandhu was not novel and no Daubert hearing was required. Response, Ex. D.

Dr. Sandhu testified that the methods he used to quantify the morphine in Petitioner's blood were set forth in applicable analysis protocols and procedures. (TR 1091). The specific protocol or procedure for testing the amount of morphine in Petitioner's blood was developed by Dr. Sandhu at the Oklahoma State Bureau of Investigation laboratory ("OSBI lab") in conjunction with the tests performed on Petitioner's blood because this was the first time that the OSBI lab had been required to quantify morphine. However, Dr. Sandhu testified

that the methods used by him in this testing are well-established in the field. (TR 1091-1104). Petitioner thoroughly cross-examined Dr. Sandhu. Petitioner also presented Dr. Wimbish, a forensic toxicologist, as a defense witness, who testified that Dr. Sandhu's testing methods could have been more "refined " (IR 1303). The OCCA reviewed the issue as a state evidentiary matter, and Petitioner has not shown either that he was denied a fundamentally fair trial due to the trial court's failure to hold a Daubert hearing or that the appellate court's decision was contrary to, or an unreasonable application of, the Daubert principle. Consequently, Petitioner is not entitled to habeas relief concerning this claim.

XII. Right to Effective Assistance of Trial Counsel

Petitioner contends in his eighth ground for habeas relief that he was denied his Sixth Amendment right to the effective assistance of trial counsel. Evaluation of the effectiveness of Petitioner's trial counsel's assistance "requires a two-part inquiry. 'In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, and that there exists a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Williamson v. Ward, 110 F.3d 1508, 1514 (10th Cir. 1997)(quoting Kimmelman v. Morrison, 477 U.S. 365, 375 (1986)). Counsel's performance is evaluated from the attorney's perspective at the time of the assistance, considered in light of all the circumstances prevailing at that time, and indulging a strong presumption that counsel's conduct fell within the "wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689 (1984).

Petitioner specifically relies only on "the preceding seven propositions" in asserting a basis for his ineffective assistance

claim. The OCCA rejected this Sixth Amendment claim on its merits. Having carefully reviewed the record in Petitioner's criminal proceeding and having found no instance in which an error of constitutional magnitude occurred at Petitioner's trial, and also in light of the overwhelming evidence of his guilt presented at the trial and the record reflecting that Petitioner's trial counsel provided remarkably zealous representation of his client before and during the trial, Petitioner has failed to demonstrate unreasonable professional errors or that any errors by counsel prejudiced the defense. The OCCA's decision in this regard is not contrary to, or an unreasonable application of, the prevailing Strickland standard, and Petitioner is not entitled to habeas relief with this claim.

RECOMMENDATION

Based on the foregoing reasons, it is recommended that the 28 U.S.C. §2254 Petition for a Writ of Habeas Corpus be DENIED. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by June 17,2003, in accordance with 28 U.S.C. §636 and LCvR 72.1. Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 28th of May, 2003.

/s/_____
Gary M. Purcell

UNITED STATES MAGISTRATE JUDGE